

Off Duty Misconduct and What Arbitrators Really Think

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- Survey done on Social Media prior to meeting of Northwest Region of the National Academy of Arbitrators in March, 2011

Social Media Cases

Currently not many reported cases.

Current cases often draw heavily from traditional arbitral principles.

Cases likely to increase over the next 5-10 years

Future cases will require new arbitral doctrines and principles.

Off-Duty Misconduct Cases

- Social Media & Internet
- Drug Use
- DUI's
- Sexploration

Examples of Sex Cases

- Sexual preference cases
- Sexual conduct at work
- Sexual harassment outside of work

Examples of Drug Cases

- Drug Test Shows Off-Duty Use
- Employee Goes to Rehab
- Employee Admits to Off-Duty Use
- Police involvement even without arrest

Rock N' Roll

- Facebook posts
- Criminal Activity & Cyberbullying
- Divorce and the Spouse Who Calls the Employer

The Law

Duty to Bargain Concerning Private Life
Issues

Specific Contract Protections on Personal Life

Just Cause

Anti-discrimination Laws and Constitution

Union Activity

NLRB case pending in which employee fired after she criticized her supervisor on her Face Book page.

Focus on Just Cause

- Is There a Rule?
- Is There a Nexus Between the Off-Duty Conduct and the Employee's Job?

The Nexus Test

- General Rule:
- The Employer Can't Discipline For Off-Duty Conduct Without a "Workplace Nexus"
- Nexus is objective evidence that connects the conduct to the employee's ability to do the job.

Ways to Prove Nexus

- Harm to Employer's Business
- Employee Fitness to Work
- Other Employees Won't Work with the Employee

Harm to the Employer

- Notoriety
- Disparagement (social media)
- Provable Loss or Disruption to Business
- Other Employees Refuse to Work

Good news from survey

Grievant is disciplined for making a disparaging remark about a manager on Grievant's Facebook page. Grievant posted the disparaging remark from her personal computer on her own time. Under just cause, discipline should be set aside unless the employer can show evidence of actual harm to its interests.

54 percent of NW arbitrators agree

17 percent of NW arbitrators disagree

33 percent “other” (the “lawyer rule”)

Fitness

- Conduct Unbecoming
- Immorality and Public Trust
- Employee Unavailability to Work
- Connection to Work Duties

More good news from Arbitrators

A prudent employee with "role model" responsibilities such as a teacher or police officer should not maintain a public profile on Facebook.

Only 4 percent agreed.

33 percent disagreed.

62 percent said "it depends."

Factors Arbitrators think are important in Social Media Cases, where employer policy prohibits personal use

Is the rule enforced in a non-discriminatory manner = 96 percent

The employee “knew or should have known” about the policy = 94 percent

Was the employer policy “reasonable” ? = 71 percent

What was the content of the speech = 21 percent

Are there differences?

- Public Sector: expectation of privacy in off-duty cyber?
- Private Sector: Common law?

The Steward's Role

- Identify policy or rule
- Ask for evidence of nexus, especially in social media cases
- Insist on confidentiality and privacy
- Investigate past practice

Conclusion

- **General rule: it's no business of the employer what you do off the job.**
- **Watch for bargaining**
- **Just cause protects you off the job.**

Law review articles on Social Media

A. Levinson, "What Hath the Twenty First Century Wrought? Issues in the Workplace Arising from New Technologies and How Arbitrators are Dealing with Them," *Tennessee Journal of Business Law*, Vol. 11, (2010).

L. Gelman, "Privacy, Free Speech, and 'Blurry-Edged' Social Networks," *Boston College Law Review*, Vol. 50:1315, (2009)

A. Levinson, "Industrial Justice: Privacy Protection for the Employed," *Cornell Journal of Law and Public Policy*, Vol. 18 (2008-2009).

"Defamation in the Internet Age: Why *Roommates.com* Isn't Enough to Change the Rules for Anonymous Gossip Websites," *62 Florida Law Review* 259 (January 2010).